

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERTAPE POLYMER CORP.

Respondent

and

Cases 07–CA–273203
07–CA–273901

LOCAL 1149 INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL WORKERS OF AMERICA
(UAW), AFL-CIO

Charging Party

Steven E. Carlson, Esq.,
for the General Counsel.
Jeffrey A. Schwartz, Esq.,
for Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. A virtual zoom hearing in this case took place on September 28, 2021. The complaint alleges that the Respondent violated Section 8(a) (3) and (1) of the Act by suspending employees Robert Tremper and Mike Abbott because they engaged in union and protected activity. The complaint also alleges that Respondent violated Section 8(a)(4), (3) and (1) of the Act by issuing warnings to employees Tremper and Mario Pruccoli because of their union activities and because of their involvement in filing an unfair labor practice charge with the Board on the above suspensions. Respondent filed an answer denying the essential allegations in the complaint.¹ Tr. 5-6. After the conclusion of the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.²

¹ The complaint includes a compliance specification addressed to backpay assertedly due to Tremper because of his lost wages for the 5-day suspension levied on him. Assuming the suspension is found to be unlawful, Respondent has no objection to the backpay figure set forth in the compliance specification. Tr. 19.

² At the outset of the hearing the General Counsel was permitted to amend the complaint to add an allegation that Respondent violated Section 8(a)(1) of the Act by refusing to discuss contractual grievances regarding the suspensions of Tremper and Abbott. Evidence was taken on that matter, but, in his brief, counsel for General Counsel moved to withdraw that allegation. See G.C. Br. p. 1, fn. 3. The motion is granted.

Based on the briefs and the entire record,³ including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Marysville, Michigan, is engaged in the manufacture, non-retail sale and distribution of adhesive tapes. In conducting its operations during a representative one-year period, Respondent purchased and received, at its Marysville facility, goods valued in excess of \$50,000 directly from points outside of Michigan. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

I further find, as Respondent also admits, that the Charging Party (hereafter, the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent's Marysville facility operates on three shifts. The three employees whose disciplines are at issue in this case worked on the third shift, which begins at midnight and ends at 8 am. Respondent's roughly 140 employees have been represented by the Union for many years and the relationship of the parties has included successive collective bargaining agreements, the last of which was negotiated shortly before the hearing in this case to replace the one that ran from May 3, 2018 to May 2, 2021. Tr. 27.

At the time of the events in this case, Tremper and Pruccoli were splitter operators working on separate parts of a large tape splitter machine, which takes jumbo rolls of product, breaks them down to a 16-inch roll, then slits that roll to smaller sizes and finally packages the material and puts it onto pallets for the product to be distributed. Tr. 24. Abbott was an electrician who tended to the machines at the facility. Pruccoli was a committeeman for the Union and Tremper was a steward for the Union. Joe Picarello is the supervisor on the midnight shift and John Zuzga is the overall maintenance manager for the Respondent. Tr. 25, 146-147.⁴

³ The General Counsel filed an unopposed motion to correct transcript, which is hereby granted except for the alleged error at Tr. 214 line 9, which I could not verify.

⁴ Zuzga became the maintenance manager in September of 2020. He had not worked for Respondent before his appointment to that position.

The Events of February 3, 2021 and the Following Disciplines

At about 2 am on February 3, 2021, there was a fire in the facility at or near the Banbury machine, which processes and mixes additives to a rubber base that goes into the ultimate adhesive product. Tr. 84. Mike Abbott, an electrician in the maintenance department, was alerted to the fire. He and another electrician shut off the Banbury disconnect and tried to locate the source of the fire. Tr. 85. Once it was located and contained—by 3:30 or 4 am in the morning, Abbott “locked it out,” which meant that he put his personal padlock on the disconnect that controlled the Banbury. This was a safety precaution that prevented anyone from accidentally turning on the machine while maintenance was working on it. Abbott cleaned out burnt insulation on the wires at the source of the fire to prevent the fire from flaring up again; he then left the scene to perform other duties. He left further inquiry into the fire, repairs, and resumption of operations to the day shift. Tr. 86-87.

Maintenance Manager Zuzga, whose normal hours are 8 am to 5 pm on the first shift (Tr. 146), received notice of the fire in the early morning hours while he was at home. He left for the plant earlier than his normal starting time and arrived at about 6:15 am. Tr. 148. After arriving at the facility, he briefly inspected the area of the fire, which had been extinguished by then, but he had questions about the fire and its effects. He thereafter met and spoke with Mike Abbott about what had happened so he could pass the information on to contractors and others who had to deal with the aftermath of the fire. There was no intention or prospect of disciplinary action in that meeting, which took place on the work floor. Tr. 148-150.

At some point, Zuzga and Abbott started walking over to the source of the fire at the Banbury machine so Abbott could explain what he did to neutralize the area after the fire. Abbott then said that Zuzga should get his lock, presumably to put on the machine affected by the fire. Zuzga said he did not need a lock because he was not going to touch any of the equipment that would require him to lock anything. Abbott replied by repeating that Zuzga needed a lock, to which Zuzga again said he did not. At that point, Abbott asked for his union representative and Zuzga agreed. Shortly thereafter Union Steward Robert Tremper, joined Zuzga and Abbott. The three then engaged in a discussion as to whether Zuzga had to put his lock on the affected machine. Tremper and Abbott took the position that, in the past, a supervisor put his lock on a machine taken out of service. Zuzga, who had taken over his management duties some 4 or 5 months before, insisted that he did not need to put his lock on the machine for what he needed to do. He simply wanted to go to the affected machine and have Abbott show him the area of the fire and what had been done to remedy the situation. The interchange became argumentative and tense so Zuzga led the others to his office where they could speak in private without the interference of work floor noise. Tr. 150-153. At that point, all three, Zuzga, Abbott and Tremper, were wearing earplugs. Tr. 67, 153.

When the three reached Zuzga's office, they were joined by Shift Supervisor Dennis Hillman, whom Zuzga asked to join the meeting. Tr. 153. When Zuzga asked the others to sit down, Tremper responded, "I'm not here for some sit-down party." Zuzga was surprised at the comment but responded "okay" and Tremper remained standing throughout the meeting. Tr. 153. Then Zuzga turned to Abbot and asked him why he thought that Zuzga needed to get his lock before he went to the machine with Abbot to ask questions about the fire and how it was handled. Abbot responded that the previous maintenance manager had that practice. Zuzga asked what the reason was for that past practice but did not get an adequate reply. He stated his view that it was unnecessary to put his lock on the machine because of his assessment of company policy and what he had to do at that time. Tr. 153-154. Zuzga indicated that he was sticking with his view and asked that the meeting end because he needed "to get out there with Mike" in order for him to find out "what's going on with the machine." Tr. 155

At that point, Tremper started to argue with Zuzga about the company policy, which was apparently based on an OSHA regulation with which Zuzga was very familiar. Zuzga asked if Tremper was familiar with the policy and Tremper replied "no, that's not my job. That's your job." Zuzga agreed and said that "neither one of you can show me how I'm making anybody unsafe. You need to get back to work." Tr. 155-156. Zuzga said that he needed to go out to the work floor with Abbott to discuss with him what was done there after the fire. Tremper continued to argue and insisted that Abbott was not going to go out to the work floor without Tremper. Zuzga held to his view that the meeting was ending and Tremper and Abbott should go back to work, noting that there might be repercussions if they did not. Tr. 156, 171-173. Tremper replied that this meant that Abbott would be disciplined so he had to be present. Zuzga denied Tremper's statement, saying that no one had even mentioned discipline. Tr. 156. Zuzga again tried to end the meeting. He also told Abbott he was "temporarily suspended until we can resolve this because I can't work with you right now apparently so you're going to have to go home." Tr. 156-157.

Abbott then left the meeting but Tremper kept arguing with Zuzga and he remained standing near the door blocking Zuzga and Hillman from leaving the office. Zuzga then said the meeting was over and asked Tremper to leave. Tremper refused. Zuzga again asked Tremper to leave the office and this time Tremper asked if that was a "direct order." Finally, after more such exchanges, Tremper left the office. At one point when Tremper was in the doorway arguing with Zuzga, Tremper said this: "Are we men here? . . . We can't talk? . . . Are you a man?" Tr. 159. Zuzga simply asked Tremper again to leave. Zuzga testified that he told Tremper to leave his office "at least four times." Tr. 157-159.

Zuzga testified that he felt that Tremper was challenging him in an aggressive way, especially when he stood in the doorway and refused to leave the office as directed. Zuzga viewed Tremper's behavior as threatening and an attempt to bully management. Tr. 159, 185-191.

The above is based mostly on Zuzga's clear and detailed testimony about the events of February 3. I was very impressed with his calm and forthright demeanor. His testimony also survived vigorous cross-examination. His contemporary notes, about which he was questioned by counsel for General Counsel, essentially confirmed his direct testimony, although he candidly conceded some differences, none of them serious enough to contradict the thrust of his direct testimony or otherwise to cause me to question his reliability as a witness. In contrast, Tremper was not as detailed in his testimony and his demeanor on the witness stand confirmed Zuzga's description of his contentious and confrontational persona in the February 3 incident. Actually, Tremper's account of what happened in the meeting in Zuzga's office did not differ much from that of Zuzga, except perhaps in attributing most of the heat to Zuzga rather than himself. I have no doubt that the exchange in Zuzga's office became heated, as Tremper testified (Tr.71), but I believe Tremper was much more aggressive in his stance and tone than Zuzga. I also believe that Tremper viewed his interactions with Zuzga as a means of asserting some kind of psychological advantage over a newly installed management official: That likely explained Tremper's admitted refusal to sit when Zuzga invited the participants to sit at the beginning of the meeting in his office. Tremper confirmed (Tr. 33) that, at that point, he said "I am not here to sit down," although I believe he said something much more emphatic as Zuzga testified. That view probably also explained his disparaging remarks, while refusing to leave the office, that included asking Zuzga whether he was a "man," the essential facts of which Tremper did not deny. Nor did Tremper deny refusing to leave the office unless he received a direct order, although he attempted to minimize the matter. In fact, Tremper himself admitted he was told to leave 3 or 4 times. Tr. 74. Indeed, Tremper seemed unduly sensitive to the issue of status. All of this colored his testimony. Accordingly, as between Tremper and Zuzga, I found Zuzga to be the more reliable witness.

Although I viewed Abbott as a fairly honest witness and his account of how he handled the fire is uncontradicted, his testimony on the rest of the happenings on February 3 did not seriously deviate from Zuzga's, but it was not as complete or detailed. Neither Abbott nor Tremper disputed Zuzga's essential testimony that the two sides disagreed on the need for Zuzga to put his own lock on the out of order machine. The essence of Abbott's and Tremper's testimony seemed to be that Zuzga was insistent that he was right and they somehow took offense at that. Abbott also testified that he was preoccupied and did not listen to much of the interaction between Tremper and Zuzga in the office meeting because he was talking to his supervisor, Dennis Hillman, who was trying to "reinforce" what Zuzga "was saying." Tr. 101. And, of course, Abbott had left the office before the last part of the meeting where Tremper disparaged Zuzga and stood in the doorway refusing to leave the office despite being directed to do so. See Tr. 101-102.

Zuzga brought the February 3 incident to the attention of the HR department and recommended that Tremper be disciplined, which resulted in the 5-day suspension that is the subject of this case. Zuzga was not the sole decider as to the eventual decision on the 5-day suspension. Tr. 160-161. That was determined after discussions between Senior Human Resources Manager Amy Walton, John Zuzga, Operations Manager

Brian Newman and perhaps Production Manager Steve Mathews. Tr. 242-244. Aside from considering the statements of Zuzga and Hillman, there was no attempt by management officials to get the views of Abbott and Tremper about the incident on February 3. Tr. 256-258, 260-261. According to Respondent, Tremper's conduct violated Rule 36 of Respondent's rules, which prohibits threatening, intimidating or interfering with supervisors. The document, titled "Final Warning Disciplinary Action", was issued on February 16, 2021, by Production Manager Bruce Mathews. G.C. Exh. 3. Respondent's justification for the suspension was that Tremper intimidated Zuzga, particularly in refusing to leave Zuzga's office and by interfering with Zuzga's attempt to get information from Abbott about the status of a critical piece of equipment after the fire. Tr. 261-262. The written discipline was presented to Tremper in a meeting at 7:45 am on February 16 in Zuzga's office. Also present in addition to Zuzga and Tremper, were Mario Pruccoli, the third shift union committeeman, and Bruce Mathews.

In a separate meeting, either on February 16 or a day or two later, Abbott was presented with a written document reflecting a verbal warning, essentially for Abbott's refusal to give Zuzga the information he needed and questioning Zuzga's determination that he did not need to place his lock on the affected machine. G.C. Exh. 5. The verbal warning indicates that it was issued by Zuzga but it was presented by Supervisor Hillman. Union Committeeman Pruccoli or another union official was also present when the document was presented to Abbott. Tr., 103-106. In this warning, Zuzga cited a violation of Rule 21 of the Respondent's rules, indirect insubordination by challenging the directions of a supervisor. But Abbott was paid for the brief time he missed for being sent home for the rest of his shift of February 3. Tr. 161-162. G.C. Abbott is no longer employed by Respondent, having left at some point before the hearing in this case. Tr. 47.

At the meeting in Zuzga's office on February 16, referred to above, Pruccoli stated that he would file an unfair labor practice charge over the matter. Tr. 43-45, 113-114. He did so on February 19, 2021. The charge was filed with Region 7 of the Board, alleging a violation of the Act in the disciplines issued to Tremper and Abbott with respect to the incident on February 3. On February 24, 2021, the Regional Director for Region 7 sent a letter to Respondent's Production Manager, Steve Mathews, notifying him of the filing of the charge. G.C. Exh. 1(a). Senior Human Resources Manager Amy Walton testified that she was notified of the filing of the charge in an email from Mathews on March 1, 2021. Tr. 235.⁵

⁵ Tremper testified that the day after he received his 5-day suspension, which would have been on February 17, he was motioned into Picarello's office where Supervisor Aaron Jamison was also present. Tr. 45-47. According to Tremper, Picarello asked about the suspension and he handed both men the document he received about the suspension and both read it. Tremper responded that he was not worried about the suspension because "[w]e're just going to let the Labor Board deal with it." Tr. 47. Even though this testimony was uncontradicted, I do not credit it. The testimony does not have the ring of truth. Rather it seemed a strained attempt by Tremper to show Jamison's knowledge of the filing of the charge in support of the contention that a subsequent warning issued to him by Jamison, which is discussed later in this decision, was motivated in part by the filing of an unfair labor practice charge over the suspension. Jamison was, of course, not involved in the incident that led to the suspension and he

Also, on February 19, the Union filed grievances over the disciplines of Abbott and Tremper with Respondent under the applicable collective bargaining agreement. G.C. Exhs. 6 and 7. There was a discussion of those grievances, as well as others, at the regularly scheduled monthly grievance meeting between management and union representatives on March 18, 2021. Tr. 135-139.

The Disciplines of Pruccoli and Tremper for What Happened on February 26.

Employees Pruccoli and Tremper received warnings for not properly cleaning their parts of the multi-head slitter machine at the end of their shift on Friday, February 26.⁶ That machine spans 3 levels and workstations—the front, the middle and back. It runs on all three shifts and requires 3 operators to run. Tr. 120-121. On February 26, the regular third-shift supervisor was not working and covering for him for the last four hours of the shift was the first shift supervisor, Aaron Jamison. Tr. 121-122. Pruccoli testified that, at the end of the shift on February 26, he was working in the middle section of the machine and did his usual clean-up, including wiping off the excess glue or tape, if any, on the 5 blades used on that section of the machine. Tr. 122. As he was performing his cleaning duties at the end of the shift, Pruccoli saw Jamison motion to Tremper, who was working on the back section of the machine to pick up rolls of tape on the floor of his workstation. He also saw Tremper pick up those rolls. Tr. 123. Pruccoli then finished cleaning the cutter and left. Tr. 123.

Tremper testified that he was working in the back section of the machine on February 26. At about 7:30 am, Jamison approached Tremper and told him to clean up his area and he did so. Tr. 49.

Neither Tremper nor Pruccoli was notified that there was any problem with their work on February 26 until about two weeks later when they were both issued verbal warnings in written documents, as discussed below.

Jamison, who has been lead production supervisor in the converting department for 8 years (Tr. 195, 221), supported some of the above testimony from Pruccoli and Tremper. The main difference was that Jamison testified that, after the end of the night shift, he checked the slitter machine and found that the sections that Pruccoli and Tremper worked on were not cleaned properly. Jamison made it clear that he was not saying that the workstations were not cleaned, but rather that the cleaning job was not “satisfactory.” Tr. 213, 222. After viewing the unsatisfactory cleanliness at the end of the shift, Jamison went to his office to pick up his i-pad, which he used to take photographs of the unsatisfactory cleaning on the sections of the machine that Tremper and Pruccoli had worked on. Tr. 216-217, 227, R. Exhs. 1A-1C. He sent those pictures to the HR department along with a direction that a verbal warning be issued on the matter to the two employees. This was done that same day, February 26. Tr. 197-201, 205-207, 218. See also Tr. 231-235.

worked on the first shift, not the midnight shift, as did Picarello and Tremper.

⁶ Tremper returned to work on February 25 after his suspension ended. Tr.47.

Jamison testified, contrary to Tremper and Pruccoli, that Tremper did not pick up the tape on the floor at his workstation after he asked Tremper to do so near the end of the shift. Tr. 219-220. He conceded that he did not talk to Pruccoli at this time. Nor did he specifically instruct Pruccoli to clean his area. Tr. 219-220. According to Jamison, he checked the blades that Pruccoli was supposed to clean at the end of his shift when another employee on the first shift told him that the blades had not been cleaned, although he could not recall the name of that employee. Tr. 221, 225-226. He also testified that, although he walks through the department every day and checks every machine, he had never found "tapes that were not cleaned up or blades that were not cleaned up," at least on the slitter machine. Tr. 221. Jamison further testified that the third section of the machine was properly cleaned at the end of the third shift on February 26. Tr. 219. Jamison testified that, in his 8 years as a supervisor, he had issued disciplines for improper cleaning (Tr. 221-222), but none were introduced in evidence by Respondent. He also testified that he took photographs of other improprieties in support of his disciplines (Tr. 223), but, again, no such photographs were offered in evidence. Nor was there any other corroboration of Jamison's testimony with respect to previous similar disciplines or photographs.

Jamison further testified that, when he made the determination to discipline Tremper and Pruccoli, he was unaware that an unfair labor practice charge had been filed over the incident involving Tremper and Abbott on February 3. According to Jamison, he first learned of that charge the week before the hearing. Tr. 201-202. As indicated above, that charge was filed on February 19, 2021, and was communicated to Human Resources Manager Walton on March 1. Those objective facts support Jamison's testimony that he did not know of the filing of charges when he decided to discipline Tremper and Abbott.

In a meeting in Supervisor Picarello's office on March 8, 2021, Pruccoli and Tremper were presented with written documents reflecting verbal warnings issued by Jamison for failing to properly clean their work areas on February 26. The documents were presented to Tremper and Pruccoli by Picarello, but Jamison was not present. Tr. 124-127, 47-52. The verbal warnings cited violations of Rule 6 of Respondent's work rules, "failure to work efficiently and/or competently on work assigned." G.C. Exhs. 4 and 8. With the documents setting forth the verbal warnings were Jamison's photographs purporting to show the state of the slitter machine sections left by Pruccoli and Tremper at the end of their shift. R. Exh. 1A-1C, Tr. 124-127, 47-52.

In the March 8 meeting, Pruccoli protested that the photograph about the blade he was accused of failing to clean simply had a piece of tape on it. Pruccoli testified that it is not unusual for a piece of tape to be stuck on the blade. According to Pruccoli, there is no reason to remove the tape unless it affects the cutting ability of the blade, in which case the tape is removed. Tr. 125-126. Pruccoli testified that he would normally remove any tape on a blade during the cleaning process at the end of his shift, but he candidly admitted that he could not recall if he did so on February 26. Tr. 128. Tremper also protested his warning during the March 8 meeting and he wrote his handwritten protest on the warning. See G.C. Exh. 4.

After he received his verbal warning on March 8, Pruccoli spoke separately with Jamison, questioning the basis of the warning, in the presence also of Tremper. Tr. 128-129. Jamison said that Pruccoli did not clean the cutter and Pruccoli insisted that he did, reminding Jameson that he saw Pruccoli cleaning it. According to Pruccoli, Jamison replied that the blades were "filthy and a mess," to which Pruccoli responded that he had seen the pictures and they showed only a piece of tape on a blade and some smudges on it. Pruccoli also told Jamison that hardly anyone cleans the smudges off the blades since a so-called "wick solution" was introduced about a year before, which acted as a lubricant between blade and the tape. Tr. 129-130. Pruccoli also testified that, as a union committeeman, he never previously saw any kind of discipline issued for not cleaning a cutter blade. Tr. 130.

Tremper corroborated Pruccoli's account of their meeting with Jameson after the receipt of their verbal warnings. Tr. 53. According to Tremper, when he and Pruccoli said their cleaning on February 26 was no different than it was on any other day, Jamison replied that then it was a consistency issue, implying that not all supervisors were enforcing the matter in the same way. Tr. 54. Tremper testified that, in his experience as a union steward, he was not aware of any prior disciplines for inadequate cleaning. Tr. 55-56.

The testimony of Pruccoli and Tremper about their meeting with Jamison after they were issued their verbal warnings on March 8 was not only mutually corroborative in essence but uncontradicted because Jameson did not deny the meeting or refer to it at all in his testimony. I therefore credit their testimony about the meeting.

The day after he received his verbal warning, at the start of his shift, Pruccoli noticed smudges on all 5 blades in his section of the slitter machine. He pointed them out to his supervisor, Joe Picarello, who, upon noticing the smudges, laughed, and said he was not going "to get in the middle of this" and he walked away. Tr. 130-131. This is based on Pruccoli's uncontradicted testimony because Picarello did not testify in this proceeding.

Neither Tremper nor Pruccoli had any prior disciplines on their records prior to the March 8 verbal warnings for violating Rule 6 of the Respondent's rules, or, if they had such disciplines, they had been removed from their records, presumably based on Respondent's policy to remove disciplines after a certain period has elapsed after the date of the discipline. Tr. 253.

B. Discussion and Analysis

The Alleged Discriminatory Suspensions and Warnings

The touchstone of the analysis for the disciplinary suspensions of Tremper and Abbot for their actions and conduct on February 3 and the disciplinary verbal warnings of Tremper and Pruccoli for their failure to properly clean their workstations on February

26 is Respondent's motivation for those disciplines. The alleged improper motivation for the first set of disciplines is discrimination based on union or other protected concerted activity (Section 8(a)(3) and (1) of the Act). The alleged improper motivation for the second set of disciplines is the same, along with discrimination in connection with the filing of unfair labor practices (Section 8(a)(4)).

Such cases are analyzed under the dual motive causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. 7 (2019). Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. See *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. 7 (2018), and cases there cited.

As shown below, in applying these principles, I dismiss the discrimination allegations in this case.

The Disciplines for What Happened on February 3

The General Counsel asserts that the protected Section 7 right engaged in by Abbott and Tremper, his union representative, was the one set forth in the collective bargaining agreement (G.C. Exh. 2). G.C. Br. pp. 2-3, 20 and 21. More precisely, according to the General Counsel, Tremper and Abbott were enforcing the safety provision of the contract, which provides that Respondent "equip hazardous machinery with effective safety devices." Section 18.1 of G.C. Exh. 2. The General Counsel also asserts that Abbott and Tremper were bringing those safety concerns to the attention of Zuzga under Step 1 of the contractual grievance procedure. Section 4.1 of G.C. Exh. 2. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).⁷

The General Counsel disavows any reliance on the protected Section 7 right defined by the Supreme Court's ruling in *NLRB v. J. Weingarten*, 420 U.S. 251 (1971). See G.C. Br. at p. 23, fn. 16. However, I find that decision (and its progeny) instructive, in at least an analogous sense, in analyzing the issues in this case. In *Weingarten*, the

⁷ The record does not support a finding that Tremper and Abbott explicitly asked for a Step 1 grievance meeting or explicitly even raised a contract grievance either in the meeting on the work floor or the meeting in Zuzga's office. The dispute was over whether Zuzga should put his own lock on the affected machine for what he wanted to do—have Abbott explain at the site of the fire what he had done with respect to the fire. I am not sure that that amounts to a contractual grievance. Nor is there evidence that the alleged grievance over safety matters proceeded beyond Step 1. Nevertheless, I have no doubt that Tremper and Abbott were engaged in protected activity of some kind when they met with Zuzga on February 3. Accordingly, I will accept, for the purpose of my analysis, the General Counsel's explanation of the protected union activity involved in this case. That of course does not answer the question whether the discipline was motivated by that protected activity.

Court stated that an employer violates Section 8(a)(1) of the Act when it denies an employee's request to have a union representative present at an investigatory interview that the employee reasonably believes might result in disciplinary action. The test for the latter determination is measured by an objective standard under all the
 5 circumstances in the case, rather than by the employee's subjective belief. See *Southwestern Bell Telephone Co.*, 338 NLRB 552 (2002), finding that the standard was not met. It is also clear that, even in a *Weingarten* situation, where a union representative is representing an employee in a meeting that may result in discipline, a union representative who engages in conduct that interferes with the proper
 10 interrogation of the employee or upends the employer's control of the meeting exceeds his or her role as a union representative. Indeed, an employer may, in those circumstances, lawfully eject the union representative from the interview. See *New Jersey Telephone Company*, 308 NLRB 278, 279-280 (1992); and *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 3-4 (2019).

15 As an initial matter, I find that, in the exchange on the work floor and in the meeting in Zuzga's office, Abbott did not have an objectively based belief that he was in danger of being disciplined. In their first encounter on the work floor, Zuzga made it clear that he simply wanted Abbott to go with him to the source of the fire to point out
 20 what the problem was and what he had done to rectify it. Zuzga had to have that information to determine what kind of remediation had to be done. Abbott then asked whether Zuzga was going to put his lock on the affected machine, as a previous supervisor had done in similar circumstances. When Zuzga said he did not need to put his lock on the machine for what he needed to do, Abbott asked for his union
 25 representative. Even though, at this point, there was no objective evidence that discipline was even a possibility, Zuzga nevertheless permitted Tremper to assist Abbott and join the discussion.

30 Assuming, in accordance with the General Counsel's theory of the case that Abbott and Tremper were attempting to enforce a contractual right and bringing a Step 1 contractual grievance to the attention of Zuzga, there is no evidence that Zuzga's ejection of Tremper from the meeting or the ultimate 5-day suspension of Tremper were motivated by Tremper's protected or union activity. To the contrary, Zuzga readily agreed to Abbott's request to involve a union representative in the discussion about
 35 whether he, Zuzga, should put his own lock on the affected machine. Moreover, Zuzga patiently listened to counter arguments from Tremper and Abbott. Indeed, when Zuzga cited company policy in support of his position, Tremper admitted that he had not read the policy and that was Zuzga's job. When Zuzga finally made it clear he was not convinced by Tremper's and Abbott's arguments and decided, in effect, to reject their
 40 position and end the meeting, that also ended Step 1 of the grievance procedure. That the meeting ended in the rejection of the position advanced by Tremper and Abbott surely does not mean Zuzga's decision to suspend Tremper was based on unlawful considerations.

45 Despite the legitimate end of the meeting and the rejection of any asserted grievance, Tremper nevertheless remained belligerent. He continued to argue and

refused to go back to work as he was ordered. He became even more confrontational than he was at the beginning of the meeting when he refused to sit and remained standing as an act of defiance. He disparaged Zuzga by asking him whether he was a man and stood in the doorway refusing to leave even after 3 or 4 requests to leave, including asking if these were direct orders. Zuzga rightly felt challenged and threatened by such behavior. These were the real reasons for the proper ejection of Tremper and for Tremper's 5-day suspension.

Thus, I find that the General Counsel has not met the initial burden of showing that Respondent's 5-day suspension of Tremper was motivated by his union activity, including any activity on Abbott's behalf on February 3. As indicated, there is no evidence of union or protected activity animus either from Zuzga or any other official of Respondent who was involved in approving the suspension. There were no independent Section 8(a)(1) violations, normal indicia of animus, either alleged or found. And Respondent itself has had a long history of a successful bargaining relationship with the Union, including, as shown in this record, a policy of holding monthly grievance meetings with union representatives. Finally, as I also have indicated above, there is no causal connection between alleged unlawful animus and the reason for the discipline. In any event, even assuming that the General Counsel's initial burden was met, based on my findings with respect to Tremper's interference with Zuzga's attempt to get important information from Abbott and his other efforts to disrupt the meeting, Respondent would have disciplined Tremper for these other non-discriminatory reasons notwithstanding his alleged protected activity. This is reinforced by the fact that Zuzga's recommendation for discipline was carefully considered by a group of management officials before it was approved and implemented. I therefore dismiss the complaint allegation that Tremper's suspension was violative of the Act.⁸

⁸ In his brief (G.C. Br. at p. 17, fn. 12) counsel for the General Counsel asserts that the proper question to ask in analyzing this case is whether Tremper lost the protection of the Act by his improper conduct during protected activity. It is acknowledged, however, that, under the present state of the law, *Wright Line* is the appropriate standard for such cases. See *General Motors, LLC*, 369 NLRB No. 127 (2020), which overturned the four-factor balancing test set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) and substituted the *Wright Line* test for those cases. Counsel for General Counsel also points out that the General Counsel is seeking to have the Board overturn *General Motors* and return to the *Atlantic Steel* standard for such cases. Should that happen, it is not clear to me that this case is one where, as in the past, *Atlantic Steel* would have applied. The theory in that type of violation is that the alleged misconduct and the alleged protected activity are inseparable so that a balancing of competing rights is required. That is not the case here. Assuming, however, that Tremper and Abbott were engaging in protected activity in bringing a safety-related grievance to the attention of management during the meeting with Zuzga in the latter's office, that meeting ended when the grievance was denied. Tremper's misconduct continued thereafter so he was not involved in protected activity when he engaged in the conduct for which he was disciplined. In any event, even if I were to consider this case under the *Atlantic Steel* standard, I would find, for the reasons stated in my analysis set forth above, that Tremper's misconduct was sufficient to forfeit any Section 7 right he was allegedly asserting. The result would therefore be the same—no violation. See *Piper Realty Company*, 313 NLRB 1289 (1994), a remarkably similar case out of this same region.

Turning to Abbott's suspension, which was basically for the rest of the shift on February 3, I also dismiss that allegation. For some of the same reasons mentioned above in the discussion of the Tremper suspension, I do not see any unlawful animus or related causation in Zuzga's ejection of Abbott from his office and the latter's brief suspension, which amounted to probably less than 2 hours. The decision to eject Abbott was based on Zuzga's decision to end the meeting, which, in the circumstances, was perfectly justified. The meeting had disintegrated to meaningless and repeated sharp exchanges once Tremper and Abbott persisted in insisting that Zuzga place his lock on the machine, even after Zuzga had considered their position and rejected it. Zuzga rightly ended the meeting at that point. The suspension of Abbott for the rest of the day was probably unnecessary, given that the shift was almost over, but it was not unlawfully motivated. In any event, Abbott was later paid for any lost time he suffered due to the suspension. And he is no longer employed by Respondent. Thus, even if the treatment of Abbott were viewed as technically unlawful, there is no reason, in these circumstances, to find a violation or certainly to remedy it. The matter has been "substantially remedied" or rendered moot by "subsequent conduct." See *Dish Network Service Corp.*, 339 NLRB 1126, 1128 fn. 11 (2003).

The Verbal Warnings Issued to Tremper and Pruccoli

Much of Jamison's story about the verbal warnings issued to Tremper and Pruccoli for improperly cleaning their parts of the slitter machine on February 26 sounds fishy. It seems unusual for Jamison to have gone out of his way to take photographs of the alleged poor cleaning attributed to Tremper and Pruccoli. Despite Jamison's testimony that he took pictures of other derelictions of this type, we have only his word on this. If indeed he had done so on other occasions there certainly would be evidence of such use of photographs, but here, of course, there was no such evidence submitted. Nor was there any evidence submitted to corroborate Jamison's testimony that he had issued other disciplines in the past for improper cleanliness. The mutually corroborative testimony of Tremper and Pruccoli that they knew of no such prior disciplinary actions is more reliable, especially because of their obvious knowledge of such disciplinary history, given their positions with the Union. Then there is the anomalous testimony of Jamison that he was alerted to the uncleanness of the blades by a first shift employee, which seems to conflict with his testimony that he himself discovered that impropriety. Also unusual was that Jamison did not find that the third person who was working on the machine on that shift on that day failed to properly clean the machine or took a picture of that apparently clean workstation at least to provide a contrast to the alleged messiness of the rest of the machine. I also find it unusual that neither Tremper nor Pruccoli was told of the failure to properly clean their parts of the machine until two weeks later. One would think that, if the unsatisfactory cleaning was so important, the offending employees would be told immediately of their failings—and shown the pictures as well—so that the employees could be told in a timely manner how to improve and protect the machine from whatever problems the improper cleaning caused. Instead, Tremper and Pruccoli continued to work on the machine for the next 2 weeks risking further cleaning problems to an important machine until they were told of their improprieties in formal warning notices. Finally, according to Human Resources

Manager Walton, neither Tremper nor Pruccoli had any prior disciplines for “failure to work efficiently and/or competently on work assigned,” as set forth in Rule 6, which they allegedly violated in this case. In all the circumstances, I believe that the warnings issued to Tremper and Pruccoli were, at best, nit picking, and, at worse, arbitrary.

But here is the problem on this part of the case: As a matter of law, the General Counsel must prove, at least initially, that the motive for the verbal warnings issued to Tremper and Pruccoli was either union activity or filing of the unfair labor practice charge by Pruccoli on behalf of Tremper. That has not been accomplished on this record. Jamison may have been petty in his disciplines, but there is no evidence that he had a discriminatory motive in doing so—either because of union activity or the filing of an unfair labor practice charge. He specifically denied even knowing about the filing of the charge when he made his decision to discipline the two employees on February 26. And there is no evidence to contest or doubt that testimony. Moreover, in this case at least, it appears that no other supervisory or management officials were involved in the decision to issue the disciplinary warnings. And Jamison himself did not exhibit anything like anti-union animus. Accordingly, the General Counsel has failed to meet the initial burden of proving a violation and I must dismiss this aspect of the complaint.

Even though I have found no violations on this part of the case, based on my assessment of the situation as set forth above, including Jamison’s apparent admission that there may have been inconsistent enforcement by different supervisors of machine cleaning protocols, I recommend that the Respondent expunge the verbal warnings issued to Tremper and Pruccoli. It appears that Respondent does have a policy of expunging warnings after the passage of a certain amount of time. See Tr. 253. This situation seems an appropriate application of that policy.

Conclusion of Law

Respondent has not violated the Act by suspending employees Tremper and Abbott, or by issuing verbal warnings to employees Tremper and Pruccoli

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended⁹

ORDER

The complaint herein is dismissed in its entirety.

⁹ If no exceptions are filed, as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

Dated at Washington, D.C., November 2, 2021.

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A handwritten signature in black ink, appearing to read "Robert A. Giannasi". The signature is written in a cursive, flowing style with a horizontal line underneath it.

Robert A. Giannasi
Administrative Law Judge

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